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No. 87-382

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

STATE TAX COMMISSION OF THE STATE OF NEW YORK, *et al.*,
Petitioners

v.

HERZOG BROTHERS TRUCKING, INC., *et al.*

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE SENECA NATION OF INDIANS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE SENECA NATION OF INDIANS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Seneca Nation of Indians respectfully moves this Court for leave to file this brief *amicus curiae* in the above captioned case. The brief for the United States as *amicus curiae* informs the Court of proposed motor fuel tax regulations recently issued by the State Tax Commission and of pending discussions between New York State and the Seneca Nation concerning the matters at issue in this case. The brief for the Seneca Nation as *amicus curiae* sets forth the position of the Seneca Nation on these two matters. Written consent for the filing of this brief has been given by the Petitioner State Tax Commission of the State of New York and has been filed with the Clerk of this Court. Consent was not given by Respondent Herzog Brothers Trucking Inc.

The Seneca Nation of Indians is a federally recognized Indian tribe residing on the Allegany, Cattaraugus and Oil Spring Reservations. The Seneca Nation has a well organized legal system which includes a tax and regulatory scheme applicable to the wholesale and retail distribution of motor fuel on its Reservations. The Seneca Nation is now considering the State's proposed regulations and will soon inform the State of its position on these regulations and on the other state tax matters on which these parties have been negotiating. These negotiations may resolve the matters at issue in this case.

The Seneca Nation moves for leave to file this brief to suggest to the Court that the proposed regulations should first be presented to the court below, without action by this Court, and that therefore the petition for a writ of certiorari should be denied. This position is supported by prior decisions of this Court, which establish that the impact of the proposed state action on tribal interests must be considered in determining the validity of state action which may interfere with these interests. *See e.g. California v. Cabazon Band of Mission Indians*, 480 U.S. ——, 94 L.Ed.2d 244 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

The Seneca Nation is concerned that the tribal interests implicated by the proposed new regulations will not be presented to the Court in the present posture of this case. Wherefore, the Seneca Nation respectfully requests that this motion for leave to file the attached brief *amicus curiae* be granted.

Respectfully submitted,

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Dated: June 16, 1988

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BRIEF FOR THE SENECA NATION AS AMICUS CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE SENECA NATION

The Seneca Nation is a federally recognized Indian tribe residing on the Allegany, Cattaraugus and Oil Spring Reservations. The Seneca Nation has enacted its own tax and regulatory scheme applicable to the wholesale and retail distribution of motor fuel on its Reservations. In addition, the Seneca Nation itself operates two retail establishments which sell motor fuel and which help support the delivery of tribal services and the operations of tribal government. The State's new proposed regulations may interfere with the Seneca Nation's tax and regulatory scheme and other tribal interests in a

manner prohibited by prior decisions of the Court. As such, the Seneca Nation is vitally interested in this case.

SUMMARY OF ARGUMENT

There is no reason for the Court to grant the petition for a writ of certiorari in this case. The decision of the court below is interlocutory. It addresses the propriety of granting preliminary injunctive relief to the respondent. Recognizing this, the State has, in response to that ruling, proposed new regulations which it intends to present to the court below. Under these regulations, the State would precollect its motor fuel and sales tax on sales by Indian retailers to non-Indians. The proposed regulations are now being considered by the Seneca Nation, and have not yet been presented to the court below. Prior decisions of this Court make the impact of the proposed regulations on tribal interests a matter to be considered first in that court. If more were needed, consideration of the issues in this case by this Court is inappropriate because these issues may be settled by an agreement between the Seneca Nation and the State.

ARGUMENT

I. THE PETITION PRESENTS NO IMPORTANT QUESTION WORTHY OF CONSIDERATION BY THIS COURT

A. The Decision Of The Court Below Is Interlocutory In Nature And Accordingly The State's Proposed Regulations Should First Be Presented To That Court.

In this case, the New York Court of Appeals upheld a preliminary injunction restraining the State of New York from *precollecting* motor fuel and sales taxes on sales made by Herzog Brothers Trucking, Inc., a non-Indian distributor of motor fuels, to Indian retailers on the Seneca Indian Reservation. The Court of Appeals

held that "the only issue before us on this appeal by certified question is whether, on the motion for a preliminary injunction, plaintiffs failed to establish, as a matter of law, the requisite clear likelihood of success on the merits . . ." Pet. 6-7. This decision correctly applies the principles set forth in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1975) and other cases of this Court to the peculiar New York law.

At this interlocutory stage of the case, the petition presents no question worthy of consideration by this Court. Not only is the decision not final, there are new matters, specifically the State's proposed regulations, which have neither been presented to nor considered by the court below. Indeed, both the proposed regulations and the facts relevant to their consideration under prior decisions of this Court are matters which should first be addressed in the trial court. The trial court may then consider these matters before issuing a final decision. Finally, it may well be that the issues in this case will be settled by negotiations between New York and the Seneca Nation.

B. Under Prior Decisions Of This Court The Impact Of The Proposed Regulation On Tribal Interests Should be Considered Before This Case Is Heard By This Court

New York requires that distributors precollect motor fuel and sales taxes on all motor fuel sold to a retailer at the time of sale. Ordinarily, the retailer then presumably passes on the taxes to the ultimate purchasers. However—under prior decisions of this Court—these state taxes cannot be charged to Indian purchasers. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976); *Bryan v. Itasca County*, 426 U.S. 373 (1976). Nor may a state impose a tax collection scheme which "would to a substantial extent frustrate evident congressional purpose of ensuring that no burden shall

be imposed upon Indian traders for trading with Indians on reservations." *Warren Trading Post v. Arizona Tax Comm.*, 380 U.S. 685, 691 (1965).

The Court below, ruling on an appeal before it on a motion for a preliminary injunction, held that the State's precollection scheme could not lawfully be imposed on respondent. In response to this decision, the State has proposed new regulations under which it would precollect these taxes on sales by Indian retailers to non-Indians only. Whether the State taxes here involved may be precollected from Indian retailers in the manner proposed in the proposed regulations is an issue on which the parties should first be provided an opportunity to develop a record, showing, *inter alia*, the impact of the proposed regulations on the interests of the Seneca Nation. The relevant facts may include those which would show whether the application of the State's proposed regulations would interfere with federal and tribal interests, including those arising from the Seneca Nation's tax and regulatory scheme. *California v. Cabazon Band of Mission Indians*, 480 U.S. ——, 94 L.Ed.2d 244 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). At trial, it may also be appropriate for the court below to undertake "a particularized inquiry into the nature of the state, federal and tribal interests at stake . . . to determine whether, *in the specific context*, the exercise of state authority would violate federal law." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980) (emphasis added). *See also Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982). This determination cannot be made on the spare record presented in this interlocutory appeal.

Moreover, even if the Court were interested in reviewing an issue of this narrowness, there is no occasion to consider the issue now. The present record in this interlocutory appeal discloses no emergency or irreparable harm to the State if precollection is enjoined—as the

Court of Appeals did unanimously—until final judgment is entered in this case. The question may well be one that can adequately be resolved by lower courts. Alternatively, it may well be that the State and the Seneca Nation will resolve this case through negotiations. In these circumstances there is no sufficient reason for the Court to grant the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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